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No. 08-479

IN THE
Supreme Court of the United States

SAFFORD UNIFIED SCHOOL DISTRICT # 1; KERRY WILSON, husband; JANE DOE WILSON, wife; HELEN ROMERO, wife; JOHN DOE ROMERO, husband; PEGGY SCHWALLIER, wife; JOHN DOE SCHWALLIER, husband,

Petitioners,

v.

APRIL REDDING, legal guardian of minor child,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

	Page
Table of Cited Authorities	ii
I. The Search Was Constitutional.	1
A. The search was justified at its inception.	1
B. The search was reasonable in scope. .	5
C. Student privacy remains adequately protected.	11
II. The School Officials Are Certainly Entitled To Qualified Immunity.	12
Conclusion	15

TABLE OF CITED AUTHORITIES

Page

Cases

Bilbrey ex rel. Bilbrey v. Brown,
738 F.2d 1462 (9th Cir. 1984) 13

Brigham City v. Stuart,
547 U.S. 398 (2006) 12

Cornfield ex rel. Lewis v. Consolidated High Sch. Dist. No. 230,
991 F.2d 1316 (7th Cir. 1993) 9

Farmer v. State,
275 S.E.2d 774 (Ga. Ct. App. 1980) 9

Goss v. Lopez,
419 U.S. 565 (1975) 10

Ingraham v. Wright,
430 U.S. 651 (1977) 11, 12

In re A.H.A.,
2008 WL 5423258 (Tex. App. 2008) 9

In re Z.L. v. Jeff L.,
883 N.E.2d 658 (Ill. App. Ct. 2008) 8

Matter of Pima County Juvenile Action,
733 P.2d 316 (Ariz. Ct. App. 1987) 13, 14

Cited Authorities

Page

Neal v. State,
256 S.W.3d 264 (Tex. Crim. App. 2008) 8

New Jersey v. T.L.O.,
469 U.S. 325 (1985) ..... *passim*

Oregon v. Hass,
420 U.S. 714 (1975) 12

Outlaw v. United States,
604 A.2d 873 (D.C. 1992) 8

Phaneuf v. Fraikin,
448 F.3d 591 (2d Cir. 2006) 5, 6

Rone v. Daviess County Bd. of Educ.,
655 S.W.2d 28 (Ky. Ct. App. 1983) 9

Smith v. McGlothlin,
119 F.3d 786 (9th Cir. 1997) 14

State ex rel. Galford v. Mark Anthony B.,
433 S.E.2d 41 (W. Va. 1993) 7, 8, 9

Terry v. Ohio,
392 U.S. 1 (1968) 13

Thompson v. State,
347 So. 2d 1384 (Ala. Crim. App. 1977) 8

Williams ex rel. Williams v. Ellington,
936 F.2d 881 (6th Cir. 1991) 6, 7, 9, 10

Cited Authorities

Page

Constitution

U.S. Const. Amend. IV 5, 7, 12

I. THE SEARCH WAS CONSTITUTIONAL.

Redding continues to talk in circles about the applicable legal standard. On the one hand, she concedes that probable cause was not necessary. Resp. Br. at 24. On the other, she argues that petitioners needed more than just the reasonable suspicion that was necessary to search her backpack. *Id.* Regardless, both sides agree that *T.L.O.* controls the analysis with its twofold inquiry.

A. The search was justified at its inception.

Redding cannot legitimately dispute that a search was justified at its inception with reasonable grounds for suspecting that it would turn up evidence that she was violating Safford's policies that prohibit the nonmedical use or possession of drugs on campus. If she could, she would challenge the search of her backpack. Certain of her *amici* likewise concede the point: "In carrying out its duty to protect the entire student body from the harmful effects of drugs, [the school] justifiably searched [Redding's] backpack." Juv. L. Ctr. *Amicus* Br. at 15.

Having struck out with earlier arguments, Redding does try out a couple new ones in a futile attempt to discredit the grounds for suspecting her of possessing and distributing pills. For example, there is no support for Redding's criticism of Marissa's tip as self-exculpatory because it in no way reduced her guilt. Even if Marissa did get the pills from Redding, she was still caught with them in her possession and had distributed at least one herself to Jordan. J.A. 11a-12a. So Redding takes the new approach of denying the girls' friendship,

perhaps to imply some ulterior motive on Marissa's part. Resp. Br. at 33.

Redding commenced this action nearly five years ago. And right up until just a few weeks ago, she never attempted to contest the claim of her friendship with Marissa. For the most part, she chose instead to remain deafeningly silent on the subject of her relationship with Marissa, even as she denied any friendship with Jordan. J.A. 26a. But on occasion, even she conceded what was already apparent from the facts. In her opening brief before the Ninth Circuit, Redding acknowledged that "[she] was friendly with Marissa and loaned Marissa her planner, because Marissa advised that she wanted to hide cigarettes, a lighter and jewelry from her parents." Appellant's Opening Br. at 19.

Moreover, if Redding really believed that the claim of her friendship with Marissa was a misstatement of fact, then she had an obligation to point that out in her opposition to the petition for writ of certiorari, which she did not do. Supreme Ct. R. 15.2. And so she should not be heard to do so now, particularly when she fails again to offer any support from the record.

Redding also attempts to discredit the grounds for suspecting her of possessing and distributing pills by arguing that Wilson only received a report that she had possessed pills at some point in the past and that he had no basis to believe that she was still in possession of pills at the time of the search. Resp. Br. at 29-30. This is yet another example of what *T.L.O.* described as a "crabbed notion of reasonableness." 469 U.S. at 343.

What Redding glaringly omits is Jordan's report to Wilson, both that the pills were being distributed on campus that morning and that a group of students was planning to take the pills at lunch. J.A. 11a. That coupled with Marissa's direct implication of Redding as the pill supplier led Wilson to believe that Redding was in possession of pills at the time of the search. J.A. 12a-13a.

Accordingly, Redding throws logic out the window in arguing that although Wilson reasonably believed that she had supplied the pills that the group was planning to take that day, he should not have believed that she had kept any for herself (or still had some for continued distribution before lunch) because she had no intention of participating with the group. Not surprisingly, this too is a new argument that Redding never seriously advanced in any of the proceedings below. In fact, she took precisely the opposite position in response to the motion for summary judgment: "It does not make sense that [Redding] gave all of her pills to other students and kept none for herself. If she was the student passing out the pills that morning of October 8, 2003, it is logical that pills would have been found in her possession." Plaintiffs' Opposition to MSJ at 12.

Finally, Redding both misunderstands and mischaracterizes the corroborating evidence regarding the suspicion that she had recently served alcohol to students and the contraband found in her planner immediately before the search. Although the Court should credit her denial that she served and consumed alcohol, that does nothing to change the fact that Wilson

had ample reason to suspect that she had. Redding, Marissa, and their other friends were unusually rowdy the night of the school dance ***and*** smelled of alcohol. J.A. 7a, 10a. Before the dance ended, the school staff found a bottle of liquor and pack of cigarettes in the girls' bathroom. *Id.* And then Jordan confirmed Wilson's suspicion with his voluntary and unsolicited report that Redding had served Jack Daniel's, Black Velvet, vodka, and tequila at a party that she hosted in her family's camper trailer before the dance. J.A. 8a, 11a.

Redding also contends that Wilson knew that the contraband found in her planner was not hers. Resp. Br. at 6. But he knew nothing of the sort. What he did know was that the planner was Redding's, that she had lent it to Marissa a few days earlier, that it was found that morning in the desk next to Marissa, and that it contained the indicated contraband. J.A. 12a-14a, 22a. But with both girls disavowing any knowledge of that contraband, it was still an open question as to who exactly it belonged to, if not both of them. J.A. 13a-14a, 22a.

The relevance of the corroborating evidence is clear to all but Redding. Resp. Br. at 38-39. If she had previously distributed one type of drug—alcohol—to Marissa and others, it was more probable that she was distributing another type of drug—prescription and OTC pills—to Marissa and others. Likewise, Redding's admission that the planner was hers and that she had lent it to Marissa certainly raised a concern that she was involved with Marissa in bringing the planner's contents—knives and lighters, a cigarette, and black permanent marker—onto campus. J.A. 12a, 14a, 22a.

And if she was involved with Marissa in bringing these forms of contraband onto campus, it was more probable that she was involved with Marissa in bringing another form of contraband—prescription and OTC pills—onto campus.

With this corroborating evidence on top of Marissa's direct implication of Redding as the pill supplier, the search was justified at its inception.

B. The search was reasonable in scope.

In arguing that the search was unreasonable in scope, Redding adopts the position articulated by the United States. Resp. Br. at 25-27, 39-43. The federal government submits that before the search in this case could be lawfully conducted, petitioners needed some specific reason to believe that Redding had hidden pills in or under her clothing. U.S. *Amicus* Br. at 14-17, 21-22. Notably, the federal government acknowledges that "this requirement is [actually] a departure from the general Fourth Amendment rule" and is not applicable in any other context. *Id.* at 14-15, 17 n.4.

As a demonstration of how this unprecedented requirement might operate, the federal government applies it to the facts of a recent decision from the Second Circuit. *Id.* at 24. In *Phaneuf v. Fraikin*, the Second Circuit invalidated a search prompted primarily by a disinterested classmate's tip that the plaintiff had marijuana and was planning to hide it down her pants. 448 F.3d 591, 592-93 (2d Cir. 2006). Although the classmate never saw any marijuana, her tip was based on the plaintiff's own statement. *Id.* at 593. During the

ensuing search, school officials required the plaintiff to lift her shirt and pull her bra, drop her skirt to her ankles, and pull her underpants away from her body so that her buttocks could be viewed. *Id.* at 594. No marijuana was found. *Id.* But despite the Second Circuit's conclusion that the search was unlawful, "[t]he [federal] government's approach would lead to a different result in *Phaneuf* because the school officials there could reasonably suspect both that the student possessed contraband and that the contraband was hidden in a location that an order to disrobe would reveal." U.S. *Amicus* Br. at 24.

Of course, the federal government's novel approach would also lead to a different result in other cases as well. For example, in *Williams ex rel. Williams v. Ellington*, the Sixth Circuit upheld a search prompted primarily by a disinterested classmate's tip that the plaintiff was sniffing a white powdery substance in class that she kept in a small, clear glass vial. 936 F.2d 881, 882-83, 887 (6th Cir. 1991). Upon questioning by school officials, the plaintiff's friend produced a small brown vial that contained "rush," a substance that could be purchased over the counter but was illegal to inhale. *Id.* at 882-83. Plaintiff, however, denied possessing any drugs and did not appear disoriented or intoxicated. *Id.* at 883. Still, school officials proceeded to search her locker and purse, which did not turn up any evidence of drug use. *Id.* Next, school officials had her remove her T-shirt and lower her jeans, and pulled on the elastic of her undergarments to see if anything would fall out. *Id.* No drugs were found. *Id.* But notwithstanding the Sixth Circuit's conclusion that the search was lawful, the federal government would decide *Williams* differently

because although the school officials had reason to believe that the plaintiff possessed a drug, the classmate's tip did not provide any indication that the plaintiff had hidden the drug in or under her clothing.

The Sixth Circuit's decision offers a rationale for why the federal government's deviation from the general Fourth Amendment rule is wrong. First and foremost, the suspected nature of the white powdery substance put student health and safety at risk. *Id.* at 887. That concern was further heightened when the plaintiff's friend produced the vial containing "rush." *Id.* Second, the object sought was small. *Id.* Conversely, it is safe to assume that had the school officials searched the plaintiff's underwear for a larger object such as a rifle or bat, the Sixth Circuit would have deemed the search unreasonable in scope. Third, before searching the plaintiff's clothing, the school officials had searched the less intrusive areas of her locker and purse. *Id.*

Implicit in the latter is a point almost too obvious to mention. "[T]he best place to *hide* something is where it is unlikely to be discovered." *State ex rel. Galford v. Mark Anthony B.*, 433 S.E.2d 41, 49 (W. Va. 1993) (Neely, J., dissenting).[1] So while it would be nice if students with

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1. In *Mark Anthony B.*, a student stole $100 in cash from a teacher and stuffed it down the back of his underwear. *Id.* at 42-43. The dissent's statement more fully reads:

> Indeed, had the appellant been suspected of stealing an elephant, searching his underwear would have been "unreasonable." But where else would a guilty child hide $100? I suppose that he could have taped

(Cont'd)

contraband chose to leave those objects out in plain view or only "hide" them where they could easily be discovered, this is wishful thinking. And to avoid discovery, students unfortunately do resort to hiding contraband in or under their clothing:

- A 15-year-old girl hid marijuana cigarettes in her bra. *Thompson v. State*, 347 So. 2d 1384, 1385-86 (Ala. Crim. App. 1977).

- A 15-year-old girl hid stolen credit cards in her underwear. *Neal v. State*, 256 S.W.3d 264, 276 (Tex. Crim. App. 2008).

- A juvenile concealed 16 bags of rock cocaine in his underwear. *Outlaw v. United States*, 604 A.2d 873, 874-75 (D.C. 1992).

- A kindergartner is described as "clever about hiding [stolen] things up his sleeve and in his underwear." *In re Z.L. v. Jeff L.*, 883 N.E.2d 658, 671 (Ill. App. Ct. 2008).

(Cont'd)

> the hundred dollar bill to his forehead on the theory that the best place to hide things is in plain view, and, of course, he could have placed it in his desk where a less intrusive search would have easily uncovered it. However, nine out of ten experienced thieves believe that the best place to *hide* something is where it is unlikely to be discovered. If any search is justified, then a search reasonably calculated to discover *hidden* contraband is justified. *Id.* at 49.

- A student hid packages of hand-rolled cigarettes in his underwear. *Farmer v. State*, 275 S.E.2d 774, 775 (Ga. Ct. App. 1980).

- A student hid a bag of marijuana inside the waistband of his pants. *In re A.H.A.*, 2008 WL 5423258 (Tex. App. 2008).

- A student hid stolen money in his underwear. *Mark Anthony B.*, 433 S.E.2d at 42-43.

- A student "crotched" drugs during a raid. *Cornfield ex rel. Lewis v. Consolidated High Sch. Dist. No 230*, 991 F.2d 1316, 1322 (7th Cir. 1993).

As these cases and others demonstrate, "underclothing [is] a prime hiding place for controlled substances" and other contraband. *Rone v. Daviess County Bd. of Educ.*, 655 S.W.2d 28, 29-30 (Ky. Ct. App. 1983) (involving a search of a student for drugs).

As in *Williams*, the suspected infraction of possessing and distributing prescription and OTC pills was one that put student health and safety at risk. And Wilson's concern was similarly heightened by the fact that he did not just suspect that pills were on campus, he confirmed it both by the pill that Jordan gave him and the fistful of pills that he found on Marissa. J.A. 11a-12a. His concern was further heightened by Jordan's report that a group of students was planning to take the pills that day at lunch, the other ominous contraband found in Redding's planner immediately before the search, and the school's history of student

injury from the abuse of pills. J.A. 10a-14a. That history included a near fatality the year prior as well as Jordan's violent episode just days earlier. J.A. 10a-11a.

And as in *Williams*, Wilson first completed the less intrusive search of checking Redding's backpack for pills. J.A. 14a. But students are also known to hide contraband in or under their clothing, and the pills sought were certainly small enough to be discreetly hidden there.

Respectfully, the federal government fails to justify the adoption of an unprecedented constitutional rule that would stunt school officials' discretion even in the most serious situations when they confront imminent threats to student health and safety. Nor do petitioners agree that such a rule is implicit in *T.L.O.*, which speaks explicitly of the problems of "drug use and violent crime in . . . schools" and the attendant need for "flexibility" and "immediate, effective action." 469 U.S. at 339-40 (quoting *Goss v. Lopez*, 419 U.S. 565, 580 (1975)).

Finally, petitioners question the wisdom of an across-the-board rule that may have the effect of further endangering the school environment by actually encouraging students to carry contraband on school campuses. Once students realize that school officials have no discretion to conduct a more intrusive search without some specific reason to believe that the contraband sought is hidden in or under clothing, students will have less cause to be concerned or anxious about being caught. Indeed, in many situations, hiding contraband in or under clothing will afford students a safe harbor even when school officials reasonably believe that the students possess contraband—including drugs and weapons.

C. Student privacy remains adequately protected.

Should the Court reverse the Ninth Circuit's decision, Redding and some of her *amici* seem prepared to forecast the demise of student privacy. They contend that such a result will only invite abuse by giving school officials "a blank check to search anywhere and everywhere" and "a virtual *carte blanche* to conduct strip searches of students." Resp. Br. at 27; Rutherford Inst. *Amicus* Br. at 2. But such exaggerated claims mistake the Fourth Amendment's reasonableness standard and simply have no basis in fact or reality.

To be sure, the reasonableness standard accommodates school officials' substantial interest in maintaining security, discipline, and order on school grounds. *T.L.O.*, 469 U.S. at 338-43. But "[a]t the same time, the reasonableness standard should ensure that the interests of students will be invaded no more than is necessary to achieve the legitimate end of preserving order in the schools." *Id.* at 343.

Moreover, school officials and students are not adversaries, and "[t]he attitude of the typical teacher is one of personal responsibility for the student's welfare as well as for his education." *Id.* at 349-50 (Powell, J., concurring). Indeed, the overwhelming number of educators who enter the profession do so for the chance to make a positive difference in students' lives, despite often limited pay, resources, and appreciation.

Finally, the Court has already recognized that "[t]he openness of the public school and its supervision by the community afford significant safeguards" against

potential abuse. *Ingraham v. Wright*, 430 U.S. 651, 670 (1977). The community's involvement also means that the Fourth Amendment is far from the only legal protection available for students. State and local governments are certainly free, as a matter of their own law, to give greater protection to students than the United States Constitution provides. *Oregon v. Hass*, 420 U.S. 714, 719 (1975); *see also Brigham City v. Stuart*, 547 U.S. 398, 409 (2006) ("Federal interests are not offended when a single State elects to provide greater protection for its citizens than the Federal Constitution requires.") (Stevens, J., concurring). In fact, as most of Redding's *amici* are quick to point out, many state and local governments have already done so through their legislative and policy-making process. Juv. Law Ctr. *Amicus* Br. at 19-21; Nat'l Ass'n of Soc. Workers *Amicus* Br. at 14-16; Urban Just. Ctr. *Amicus* Br. at 37.

With both these legal and non-legal safeguards in place, a search of the type at issue here is a rare occurrence, and one that a school official is only likely to conduct upon a reasonable belief that student health and safety are at risk.

II. THE SCHOOL OFFICIALS ARE CERTAINLY ENTITLED TO QUALIFIED IMMUNITY.

Redding contends that two cases clearly established the law at the time of the search and precluded Wilson from reasonably believing that the search was lawful. Resp. Br. at 44-48. But in denying Wilson qualified immunity, not even the majority below bought this argument as neither case is fairly comparable.

The first is *Bilbrey ex rel. Bilbrey v. Brown*, a Ninth Circuit decision that predates *T.L.O.* 738 F.2d 1462 (9th Cir. 1984). The case involved a search of two fifth-grade students for drugs. *Id.* at 1463. The school officials patted down both boys, searched through their pockets, and had one of the boys undress to his underwear. *Id.* at 1464. The only justification for the search was a bus driver's report that she had seen the boys exchange "something" on the school playground that she was never able to identify. *Id.* And although she suspected that what they had exchanged was drugs, she could not articulate any basis for her suspicion. *Id.* Of course, this is precisely the type of "inchoate and unparticularized suspicion or 'hunch'" that this Court has decried and was nothing more than "the product of a volatile or inventive imagination." *Terry v. Ohio*, 392 U.S. 1, 27-28 (1968). Indeed, the bus driver had no more reason to believe that the boys had exchanged drugs than baseball cards or Twinkies.

In contrast, Marissa did not implicate Redding based only on some vague, unexplainable suspicion or hunch. Nor did she express any doubt whatsoever about exactly what it was that Redding had given to her. Based on actual and personal knowledge, Marissa reported that Redding had given her a fistful of pills, both prescription and OTC. J.A. 12a-13a.

The second case that Redding cites is *Matter of Pima County Juvenile Action*. 733 P.2d 316 (Ariz. Ct. App. 1987). Notably, her rather abbreviated discussion of the case omits mention of the fact that it involved an Arizona student who was caught with cocaine at school after a monitor observed him skipping class outside by

the bleachers, an area of the campus where students were known to smoke cigarettes and use drugs. *Id.* at 316-17. The cocaine was found when school officials simply asked the student to turn out his pockets. *Id.* at 316. The state court, however, suppressed the evidence of the cocaine because the monitor never saw the student engaging in any suspicious activity by the bleachers. *Id.* at 316-17.

But the case did not clearly establish the law for at least two reasons. First, a subsequent Ninth Circuit decision casts considerable doubt on whether the state court even reached the right result. In *Smith v. McGlothlin*, the Ninth Circuit reviewed the search of a student who was seen in an area near the school where students were known to congregate and smoke. 119 F.3d 786, 787 (9th Cir. 1997) (per curiam). Although the school officials had no individualized suspicion that the student had been smoking there, the Ninth Circuit opined that the ensuing search, which uncovered three knives, was reasonable. *Id.* at 788 ("And [the student] herself might have thanked her lucky stars when she got off easy because her juvenile judge misread the law and suppressed the evidence.") (Kozinski, J., concurring). With no meaningful way to distinguish the state-court case from the subsequent Ninth Circuit decision, the state court likely misread the law and reached the wrong result.

Second, even if the state court did reach the right result, the case is still not fairly comparable to this one. In the former, the state court determined that the school officials had no information to suggest that the student was involved in any wrongdoing besides skipping class.

Here, however, petitioners had specific reason to believe that Redding was possessing and distributing prescription and OTC pills.

Tellingly, not one of Redding's *amici* support her position that Wilson should have been denied qualified immunity. In fact, the Rutherford Institute, Goldwater Institute, and Cato Institute take just the opposite view in urging the "need for a controlling decision offering guidance to school officials regarding strip searches." Rutherford Inst. *Amicus* Br. at 23. Such a plea frankly acknowledges that adequate legal guidance is and has been lacking in this area and that Wilson could not have had fair notice that the search was unconstitutional.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the Ninth Circuit that the search was unconstitutional and that Wilson could not have reasonably believed that the search was lawful.

Respectfully submitted,

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